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ALEXANDER L. STEVAS,
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No. 84-340

IN THE

Supreme Court of the United States

October Term, 1984

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

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November 1984

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Petitioners' Reply Brief

There Is No Factual Foundation For Respondent's Claim That It Was Put Out Of Business By The Termination Of Its General Agency Contract 1

Conclusion 4

TABLE OF AUTHORITIES

CASES

Copperweld Corp. v. Independent Tube Corp., 104 S. Ct. 2731 (1984) 3

DeFillippo v. Ford Motor Co., 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975) 2

Hood v. Tenneco Texas Life Insurance Co., 739 F.2d 1012 (5th Cir. 1984) 4

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 1

Larry V. Muko, Inc. v. Southwest Pennsylvania Building and Construction Trades Council, 670 F.2d 421 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982) 2

Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S. Ct. 3553 (1984) 2

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 2

Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 104 S. Ct. 1464 (1984) 1

United States v. General Motors Corp., 384 U.S. 127 (1966) 1

PETITIONERS' REPLY BRIEF

There Is No Factual Foundation For Respondent's Claim That It Was Put Out Of Business By The Termination Of Its General Agency Contract.

In its effort to get away from the great weight of authority to the effect that there must be a price motivation for an alleged group boycott to be given *per se* treatment, the Respondent argues for the first time that no price aspect is required if the purpose is to put the target out of business. That argument is not open to the Respondent in this case because there is no evidence to show that Malley-Duff was put out of business as a result of the alleged group boycott. The fact is that the only effect the termination of Malley-Duff's general agency contract had on its business was that it could no longer sell Crown products through brokers. It was still entirely free to sell Crown products directly to consumers. The fact that it did not do so was purely the choice of Malley and Duff, its principals. It was also perfectly free to become general agent for any of the hundreds of life insurance companies doing business in Pennsylvania and in fact Mr. Duff did just that, but under a different corporate name. Malley and Duff quite plainly let their corporation die in order to enable them to claim that their corporation had been put out of business and thus to increase their claimed damages.

The fact that Malley-Duff was still free to sell Crown insurance policies directly to policyholders makes such cases as *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966), and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) inapposite, as is also the boycott aspect of the Monsanto case in the Seventh Circuit: *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (1982), *aff'd*, 104 S. Ct. 1464 (1984). Respon-

dent's reliance on *Larry V. Muko, Inc. v. Southwest Pennsylvania Building and Construction Trades Council*, 670 F.2d 421, 430 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982) is misplaced for the same reason.

The only case relied on by the Respondent, which it claims did not involve the price aspect, is *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), and there by a five to four vote this Court reversed the granting of a summary judgment, the majority indicating that, particularly in antitrust cases, summary judgment should be granted very sparingly. In the case at bar, the defendant's motion for summary judgment was refused and it was not until the plaintiff had had full opportunity to prove its case that a directed verdict on the antitrust counts was granted to the Petitioners, at trial after the Respondent had rested its case. More than that, *Poller* is not a boycott case—no boycott was claimed, and neither the majority opinion nor the dissent mentions boycott. Of course, in the case at bar a boycott is claimed to escape the McCarran-Ferguson exemption.

The case of *DeFillippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975), cannot be authority for the Respondent, because it was found that no boycott existed. Respondent misstates the holding in *Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S. Ct. 3553 (1984), as the following from the opinion (p. 1155) demonstrates:

> . . ."boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price-fixing agreements" . . .

* * *

> The complaint in the present case charges either a conspiracy to fix prices or limit output, a per se offense under federal as under Illinois law, or, more likely, a non-price conspiracy to exclude rivals from a professional association, which under our precedents must be tested under the Rule of Reason —and the state law is again the same.

Two other points the Respondent seeks to make deserve brief mention. While it is true that this Court's decision in *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731 (1984) was not urged upon the Court of Appeals for the Third Circuit, that is because the decision had not been handed down until after the briefs were in and the case was argued. However, the argument was made that the requisite multiplicity of parties was not present.

The statement on page 6 of Respondent's brief that "Crown Life was not attempting to improve its competitive posture," is untrue. That is demonstrated by the Respondent's own exhibit, relevant portions of which are set forth in Appendix H1-3, which makes plain the reason for the Respondent's termination as Crown's general agent in Western Pennsylvania. Although Crown's percentage of the United States market in individual sales in 1977 reached a level of .53%, Malley-Duff's percentage of the Western Pennsylvania market was only .11%. Even with the addition of the personal production of the Ehrman Agency, the total percentage of market sales came to less than .2%. Thus the Respondent's own exhibit proved the justification for Crown's termination of the Respondent; that is, that it had failed to make an adequate penetration of the Pittsburgh market.

A decision by the United States Court of Appeals for the Fifth Circuit, that had not been reported when the

Petition for Writ of Certiorari was served, deserves mention. It is the case of *Hood v. Tenneco Texas Life Insurance Co.*, 739 F.2d 1012 (5th Cir. 1984), where summary judgment was granted to the insurance company in the District Court and the Court of Appeals for the Fifth Circuit affirmed, relying on this Court's opinion in *Copperweld.*

CONCLUSION

For the foregoing reasons, as well as the reasons advanced in the Petition For a Writ of Certiorari, Petitioners Crown Life Insurance Company and Clarke Burton Lloyd respectfully ask that the Petition For a Writ of Certiorari be granted.

Respectfully submitted,

November 1984

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